88-1339

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION,

Cross-Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD., BOARDWALK PROPERTIES, INC., QUEEN CITY SAVINGS & LOAN ASSOCIATION, and MELROD, REDMAN & GARTLAN, P. C.,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In the event this Court grants certiorari and remands for further factfinding by the district court on a primary complaint, should a third-party complaint, dismissed by the court of appeals as moot, be reinstated and reconsidered as well?

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The opinion of the court of appeals is reported at 855 F.2d 963 (A.1a). 1/ The opinion of the district court is reported at 665 F. Supp. 301 (A. 67a). The district court's modification of its judgment is not reported (A. 62a). The district court's opinion denying defendants' motion for a new trial is reported at 678 F. Supp. 61 (A. 56a).

1/ "A.__" refers to pages in the appendix to the petition for a writ of certiorari filed by respondents Penthouse International Ltd. and Boardwalk Properties, Inc. (collectively, "Penthouse") in No. 88-1144.

JURISDICTION

Respondents Penthouse International, Ltd. and Boardwalk Properties, Inc. filed a timely petition for certiorari in No. 88-1144 on January 11, 1989. Counsel of Record received three copies of the petition on January 13, 1989. The jurisdiction of this Court on this cross-petition is invoked pursuant to 28 U.S.C. §1254(1). 2/

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The law of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the court of the United States where they apply.

STATEMENT OF THE CASE

Dominion Federal Savings & Loan Association ("Dominion"), pursuant to Rules 19.5 and 20.5 of the Supreme Court Rules, files this protective cross-petition for a writ of certiorari, to be considered only in the event a writ of certiorari is granted upon the petition filed on January 11, 1989 in No. 88-1144. Dominion herein incorporates by reference the Statement of the Case found in the Brief in Opposition to that petition. This protective cross-petition relates only to the third-party claim for indemnity brought by Dominion against respondent Queen City Savings & Loan Association ("Queen City"). The third-party claim asserted that, if Dominion was held liable to

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2/ Pursuant to Rule 28.1 of the Supreme Court Rules, cross-petitioner Dominion Federal Saving & Loan Association ("Dominion") discloses the following: Manchester Lakes Associates is a 50% subsidiary of Dominion Mortgage Center, Inc., which is a wholly-owned subsidiary of Dominion. 7799 Leesburg Pike Joint Venture is a joint venture in which Dominion-Tysons owns 22%. Dominion-Tysons is owned 1% by Dominion Mortgage Center, Inc. and 99% by Dominion Equity Corporation, both wholly-owned subsidiaries of Dominion. New Edson Lane Joint Venture is a joint venture in which Dominion-Edson has a 42.5% interest. Dominion-Edson is owned 1% by Dominion Equity Corporation and 99% by American Advertising Agency, both wholly-owned subsidiaries of Dominion.

Penthouse for failing to close on its commitment to fund part of a $97 million construction loan, then Queen City, as the lead lender on the loan commitment, should be liable over to Dominion for breach of its fiduciary duties to its participants. 3/

The court of appeals affirmed the district court's dismissal of that claim-over solely because it had reversed the district court's finding of anticipatory breach by Dominion and the judgment in favor of Penthouse upon which the claim-over was predicated (A. 47a). The court of appeals thus found it unnecessary to reach the merits of the third-party claim.

REASONS FOR GRANTING THE WRIT

As stated in the Brief in Opposition filed in No. 88-1144, Dominion urges this Court to deny certiorari, because this case raises no issue worthy of this Court's review. If, however, this Court grants certiorari in No. 88-1144, it should also grant this cross-petition for certiorari on the third-party claim, so that any ultimate remand to the district court would allow the entire case to be reheard, including the third-party claim against Queen City. Since the court of appeals affirmed dismissal of Dominion's claim-over only because it had reversed the findings and judgment on which it was premised, it would be unfair to Dominion were this Court to remand only the main case, but not the third-party claim.

It is settled law that upon remand from the Supreme Court, a lower court's jurisdiction "is rigidly limited to those points, and those points only, specifically consigned to [its] consideration by the Supreme Court." *Hermann* v. *Brownell*, 274 F.2d 842, 843 (9th Cir. 1960). Therefore, if Penthouse's petition is granted, then the courts should not be precluded from further consideration, in light of the relevant New Jersey law, of the liability of Queen City on Dominion's third-party claim.

3/ The third-party complaint also included a claim for damages caused by the failure to close. Dominion dropped this claim on appeal.

CONCLUSION

For the above reason, should Penthouse's petition for a writ of certiorari be granted, then this cross-petition should also be granted.

Dated: February 8, 1989

Respectfully submitted,

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